(25,370)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 540.

LOUISVILLE BRIDGE COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

INDEX.

	Original.	Print
Citation and service (copy)	1	1
Petition for appeal	2	1
Bill of complaint	4	2
Answer of the respondent	11	7
Stipulation of facts	15	9
Order of submission	19	11
Opinion, Evans, J.	20	11
Decree	38	24
Order allowing appeal and approving bond	40	25
Assignment of errors	41	25
Bond on appeal	44	27
Præcipe for record	46	28
Clerk's certificate	47	28
Citation and service	48	28

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 28, 1916.

1 *Citation.*

Issued June 19th, 1916.

Evans, Judge.

UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, D. C., on the 17th day of July, 1916, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Western District of Kentucky, wherein the Louisville Bridge Company is appellant and the United States is respondent, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Edward Douglass White, Chief-Justice of the United States, on the 19th day of June, A. D., 1916.

WALTER EVANS,
District Judge.

June 19th, 1916:

Above citation and service thereof accepted for the United States.

PERRY B. MILLER,
U. S. District Attorney for Western District of Kentucky.

2 *Petition for Appeal.*

Filed June 19th, 1916.

No. 31. In Equity.

THE UNITED STATES, Complainant,
vs.
LOUISVILLE BRIDGE COMPANY, Defendant.

The above named defendant, Louisville Bridge Company, conceiving itself aggrieved by the Decree made and entered herein on the 10th day of June, 1916, in the above entitled cause, does hereby appeal from said order and decree to the United States Supreme Court for the reasons specified in the Assignment of Errors which is filed herewith, and it prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said

order was made, duly authenticated, may be sent to the United States Supreme Court.

C. H. GIBSON,
WILLIAM W. CRAWFORD,
Attorneys for Defendant.

The foregoing claim of appeal is allowed.
Dated this 19th day of June, 1916.

WALTER EVANS,
District Judge.

Proceedings of the District Court of the United States for the Western District of Kentucky, at a Regular Term Begun and Held at the Federal Court Hall in the City of Louisville, on Monday, October 11th, 1915.

#31.

THE UNITED STATES, Complainant,
vs.
THE LOUISVILLE BRIDGE COMPANY, Respondent.

Be it remembered that heretofore, to-wit, on the 2nd., day of February, 1916, came the Complainant by counsel and filed in the Clerk's office of our said Court its Bill of Complain*ant* in the above entitled cause.

The Bill of Complain*ant* referred to is as follows:

 THE UNITED STATES, Complainant,
v.
THE LOUISVILLE BRIDGE COMPANY, Respondent.

Bill of Complaint.

To the Judges of the United States District Court for the Western District of Kentucky:

Comes now the United States by Thomas Watt Gregory, Attorney-General of the United States, and Perry B. Miller, United States Attorney for the Western District of Kentucky, thereunto duly authorized, and shows unto this Honorable Court—

1. The Louisville Bridge Company is, and at all times herein mentioned has been, a corporation organized and existing under the laws of Kentucky, and maintaining its principal office and place of business in the Western District of Kentucky.

2. Your orator further shows that the said Louisville Bridge Company has for many years past owned, maintained and operated a bridge commonly known as the Ohio Falls Bridge, and does own, maintain and operate the same, across the Ohio River at Louisville,

Kentucky, and that the said Ohio River is, and at all times herein mentioned has been, a navigable waterway of the United States.

5 3. Your orator further shows that on or about the 20th of August, 1914, the Secretary of War of the United States had good reason to believe that the said bridge owned by the Louisville Bridge Company was an unreasonable obstruction to the free navigation of the said Ohio River on account of an insufficient width of span of said bridge, and acting under and pursuant to the provisions of Section 18 of the Act of March 3, 1899, (30 Stat., 1121, 1153, Ch. 425), he, said Secretary of War, first gave reasonable opportunity to the respondent to be heard in regard to the alterations necessary to be made in said bridge in order to render navigation through and under it reasonably free, easy and unobstructed, and in order to remove the said unreasonable obstruction to navigation; which said notice and hearing was given and had in the following manner, to-wit:

He directed that a public hearing should be had after due notice to the interested parties relative to the proposed alteration of the bridge, and accordingly such public hearing was had on or about October 14, 1914, by a Board of Engineer officers of the United States at the United States Engineer Office at Louisville, Kentucky, of which hearing the respondent was notified, and at which hearing it was represented; that after a careful consideration of the subject, the said Board of Army Engineers then and there decided that the requirements of navigation would be reasonably provided for and navigation through and under said bridge would be rendered reasonably free, easy and unobstructed by increasing the span or spans in said bridge as more specifically set out in a report filed by them.

4. Your orator further shows that, having received this report, the Secretary of War, acting in accordance with and pursuant to the provisions of said Section 18 of the Act of March 3, 1899, did, on December 12, 1914, issue to and serve upon the respondent a

6 notice in the words and figures following:

Form No. 6.

WAR DEPARTMENT,
WASHINGTON, D. C., December 12th, 1914.

To Charles H. Gibson, President Louisville Bridge Company, 906 Realty Building, Louisville, Kentucky:

Take notice that—

Whereas, the Secretary of War has good reason to believe that the bridge of the Louisville Bridge Company across the Ohio River at Louisville, Kentucky, (commonly known as the "Ohio Falls" bridge) is an unreasonable obstruction to the free navigation of the said Ohio River (which is one of the navigable waterways of the United States) on account of (1) insufficient horizontal clearance of the channel span crossing the main navigable channel known as

"Indiana Chute," and (2) insufficient width of opening in the existing swing span crossing the Louisville and Portland Canal;

And whereas, the following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through or under it reasonably free, easy and unobstructed, to-wit:

(1) That the span of said bridge crossing "Indiana Chute" be so changed as to provide a horizontal opening 600 feet wide in the clear.

(2) That the existing swing-span of said bridge across the Louisville and Portland Canal be changed to a lift-span giving a horizontal clearance of 200 feet, and a vertical clearance, when open, of 78 feet above pool level of 412 feet, U. S. datum.

And whereas, three years from the date of service of this notice is a reasonable time in which to alter the said bridge as described above,

Now, therefore, in obedience to, and by virtue of, section eighteen of an act of the Congress of the United States entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899, the Secretary of War does hereby notify the said Louisville Bridge Company to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before three years from the date of service hereof.

(Sgd.) LINDLEY M. GARRISON,
Secretary of War.

7 And that said notice was duly received by respondent and receipt thereof acknowledged on January 13, 1915.

5. Your orator further shows that on the 26th day of November, 1915, the respondent in reply to said notice sent the following communication to the Secretary of War:

"Louisville Bridge Company.

President's Office.

LOUISVILLE, Nov. 26, 1915.

To the Secretary of War, Washington, D. C.

In re Reconstruction of Superstructure of Louisville Bridge.

SIR: Referring to the correspondence and conferences heretofore had concerning the above matter, I beg to advise you that I am instructed to say:

1st. The Louisville Bridge Company claims and insists on the right to renew its superstructure on the existing masonry, without making any changes in the length of any of the existing spans, so that when completed, it will not interfere with navigation any more than it does now.

2nd. The Company intends to at once commence and continue

the work of renewing its superstructure as above stated, it being its purpose to first reconstruct the five northern spans of the bridge, including the span over the Indiana channel.

If you desire it, detailed plans showing the proposed reconstruction will be furnished you.

Very respectfully,

(Sgd.) CHAS. H. GIBSON,
President."

The detailed plans showing the proposed reconstruction of said bridge are attached hereto and marked "Exhibit A."

8 6. Your orator further shows that the respondent intends, and is now proceeding, to carry out the action so positively threatened in said letter of November 26, 1915, and will completely carry out said action unless restrained by this Honorable Court; that said action of the respondent will result in the erection of a bridge not in compliance with, but in flagrant violation of, the aforesaid order and notice of the Secretary of War, and thereafter and because thereof it will be physically impossible for respondent to comply with said order and notice; that if such bridge is erected as so threatened in violation of the Secretary of War's order and notice, the physical features of said bridge, on account of which the Secretary of War, as aforesaid, has duly found the said bridge to be an unreasonable obstruction to the free navigation of the Ohio River, as specified in said order and notice, will thereby be renewed, reconstructed and made more durable, and the alteration of said features necessary to be made as prescribed in said notice in order to make the navigation of said river reasonably free and unobstructed, will require a much longer period of time for that purpose than would the alteration of the existing features as prescribed in said order and notice; that if the said alteration is not made as prescribed in said notice and order, but instead thereof the bridge is erected as threatened, in violation of said notice and order, the actual abatement of said bridge thus erected in violation of said order and notice, or the removal of the obstructive features thereof, will likewise, and for the same reason, require a much longer period of time; that such postponement and delay caused by the reconstruction which respondent now threatens to make, will, as just shown, result in the maintenance for a much longer period of time of the obstructive features of said bridge and, consequently, in the maintenance for a like longer period of time of a serious obstruction to the navigation of this great river; and that if said bridge is reconstructed as threatened by the respondent, the remedies which complainant has at law

9 under Section 18, Act of March 3, 1899, (30 Stats., 1121, 1153, 1154, Ch. 425) or in equity to abate said bridge as a public nuisance erected in violation of the said order and notice of the Secretary of War will be ineffectual to repair or prevent the great injury to navigation caused by the prolonged maintenance of the obstructive features of said bridge.

7. Your orator further shows that the action so immediately and positively threatened by the respondent will be an irreparable injury

to the complainant, in its sovereign capacity as guardian of the navigable waterways of the United States; will result in the erection of a permanent and continuous nuisance; and that there is no complete, adequate relief at law.

8. The premises considered, your orator prays that a writ of subpœna issue under the seal of this Court, directed to the respondent, commanding it on a day certain to appear before this Honorable Court and to answer this bill of complaint and all matters and things therein set forth, but not under oath, an answer under oath being hereby expressly waived; that this Court issue a preliminary order restraining the defendant and its officers, agents and employes from erecting or causing to be erected, or from taking any steps whatsoever towards the erection of, a bridge contrary to the requirements set forth in the notice to the Secretary of War aforesaid; or from reconstructing the superstructure of its present bridge upon its present piers in such a manner as to leave a span contrary to the provisions of said order and notice of the Secretary of War, or from taking any steps whatsoever to that end; or from doing any of the matters or things which it threatens to do in its letter of November 26, 1915, aforesaid; and that, upon final hearings, said preliminary injunction may be made permanent.

10 And your orator further prays for all other and further relief in the premises to which it may be entitled.

T. W. GREGORY,
Attorney-General.
PERRY B. MILLER,
United States Attorney.

UNITED STATES OF AMERICA,
Western District of Kentucky, County of Jefferson, ss:

Perry B. Miller, being first duly sworn, deposes and says, that he is the United States Attorney for the Western District of Kentucky, and that he has been duly authorized by the Attorney-General of the United States to file the within Bill of Complaint; that he has read the foregoing bill, and that the contents thereof are true, on information and belief.

PERRY B. MILLER.

Sworn to before me this 2nd day of February, 1916.

[SEAL.] A. G. RONALD, *Clerk.*
By GEORGE W. RONALD, *D. C.*

11 And on another day of said Term, to-wit, February 19th., 1916, the following answer of the Respondent was filed.

UNITED STATES OF AMERICA, Complainant,
vs.
LOUISVILLE BRIDGE COMPANY, Respondent.

Answer of the Respondent, Louisville Bridge Company, to the Bill of Complaint of the United States of America.

Comes now the respondent, Louisville Bridge Company, and for answer to said Bill of Complaint respectfully shows unto this Honorable Court—

1. Respondent admits the statements of facts contained in Paragraphs One to Seven inclusive of the Bill of Complaint, except that it denies that the renewal of the superstructure of its bridge as proposed and intended by it will result in irreparable injury to complainant, or in the erection of a permanent or continuous nuisance.

2. Respondent's bridge across the Ohio River was constructed under authority of the Act of Congress entitled "An Act to establish certain post roads," approved July 14, 1862, and the Act of Congress entitled "An Act supplemental to an Act approved July 14, 1862, entitled 'An Act to establish certain post roads.'"

3. Said bridge was completed in the month of February, 1870, and was constructed in all respects as required by the Acts
12 aforesaid, except that with respect to its height and the length of its channel spans, it materially exceeded the requirements of said Acts and rendered said bridge less of an obstruction to navigation than it would have been if it had been limited to the requirements of said Acts.

4. In 1871 a Board of Engineers of the United States Army under the direction of the Secretary of War made a critical examination of respondent's said bridge and made a report thereon which is embraced in Senate Executive Document Number 1 in Public Documents of the Forty-second Congress. The material part of said report concerning respondent's said bridge reads as follows:

"The board have no changes to recommend in this bridge, which they consider a first-class structure throughout, and very much less an obstruction than it might have been had its builders limited themselves to giving only what they were compelled by law to give. On the contrary, they have chosen to build according to the highest of the three authorized plans, and have exceeded the heights and widths that even this plan required, spending $150,000.00 more than was necessary to comply with the letter of the law. Instead of a 300-foot opening at low water, one of their channel spans gives 380 feet, and the other 253¼ feet."

5. Since the completion of respondent's bridge in February, 1870, it has been in constant use as a railroad bridge, and it is now indispensably necessary that said bridge should be repaired by renewing the existing steel superstructure with a new superstructure to be erected on the existing masonry and which will not, in any way, obstruct navigation any further than the existing bridge has for forty-six years past.

6. Since the construction of respondent's bridge, material changes have resulted in connection with the navigation of the falls of the Ohio River, all due to the action of the complainant.

Prior to the year 1880, the tolls of the Louisville & Portland Canal at the falls of the Ohio were an onerous burden on
13 river traffic, and the facilities of the canal were such as made navigation through it slow and tedious.

In 1880 the complainant acquired said canal, discontinued all charges in the way of tolls, and greatly improved its facilities for navigation, with the result that, continuously since then, navigation over the falls of the Ohio has greatly decreased.

Complainant is now engaged in the work of widening the Louisville & Portland Canal and increasing its depth, which work, when completed, will cause a further increase in navigation through the canal, and further diminish navigation over the falls.

7. This respondent had notice of, and attended the public hearing referred to in the Bill of Complaint, but took no part therein except to protest against the hearing and declare it was not legally bound or affected by anything done at said hearing, or by any action which might be taken as the result of said hearing, because, as respondent then claimed and now claims, it had the right to perpetuate its bridge and do any work of repair thereon necessary to render it safe (without causing any additional permanent obstruction to navigation), and because the Congress, under the Acts authorizing the construction and maintenance of said bridge, and designating it a lawful structure and a post road, did not reserve any right to require respondent to make any alterations or changes in said bridge after it was erected in accordance with the requirements of said Acts.

Respondent has at all times protested, and now protests, that it is not affected by the Act of Congress under which the Secretary of War has assumed the authority to condemn respondent's bridge as an obstruction to navigation, and to require respondent to alter and change said bridge at its own expense, which would require and additional expenditure by respondent of approximately $400,-
000.00, and result in taking the property of the respondent
14 for public use without compensation, and in depriving respondent of the equal protection of the laws.

Wherefore, respondent prays that the Bill of Complaint herein be dismissed, and for all proper relief to which it may be entitled.

WILLIAM W. CRAWFORD,
Solicitors for Respondent.

15 And on another day, to-wit, April 22nd, 1916, the following Stipulation of Facts, was entered of Record and filed.

UNITED STATES OF AMERICA, Complainant,
vs.
LOUISVILLE BRIDGE COMPANY, Respondent.

Stipulation of Facts.

It is agreed between the United States of America, complainant herein, and Louisville Bridge Company, respondent herein, that upon the hearing of this cause the following facts may be considered as in evidence as fully as if proven herein:

I.

(*a*) That the order of the Secretary of War was regularly issued in exact compliance with Section 18 of the River and Harbor Act of March 3, 1899, (30 Stat., 1121, 1153) and the respondent refuses to comply with that order. If the said order of the Secretary of War, dated December 12, 1914, referred to in the Bill of Complaint herein directing certain changes in the bridge of the Louisville Bridge Company, is an order which the Secretary of War can lawfully issue with reference to the bridge of the Louisville Bridge Company, then the rebuilding of the superstructure of the bridge on the present piers, as proposed and undertaken by the Louisville Bridge Company, will result in the erection of a permanent and continuous nuisance and irreparable injury to the United States Government, and that there is no complete, adequate relief at law.

(*b*) If the Secretary of War, under Section 18 of said Act, could not lawfully issue said order with reference to the bridge of the Louisville Bridge Company, then the rebuilding of the superstructure of the bridge on the present piers as proposed and undertaken by the Louisville Bridge Company, will not result in the erection of a permanent and continuous legal nuisance and irreparable injury to complainant.

16

II.

The bridge of the Louisville Bridge Company was completed in the month of February, 1870, and was constructed in all respects as required by an Act of Congress entitled "An Act to establish certain post roads," approved July 14, 1862, and the Act of Congress entitled "An Act supplemental to an act approved July 14, 1862, entitled 'An Act to establish certain post roads,'" except that with respect to its height and length of its channel spans, the bridge as constructed by the Louisville Bridge Company materially exceeded the requirements of said Acts and was less of an obstruction to navigation than it would have been if it had been limited to the requirements of said Acts.

III.

Following the completion of the bridge of the Louisville Bridge Company in 1871, a Board of Engineers of the United States Army, under the direction of the Secretary of War, made an examination of the bridge about which this controversy arises and made a report thereon, which is embraced in Senate Executive Document Number 1 in Public Documents of the Forty-second Congress. The material part of said report concerning said bridge reads as follows:

"The board have no changes to recommend in this bridge, which they consider a first-class structure throughout, and very much less an obstruction than it might have been had its builders limited themselves to giving only what they were compelled by law to give. On the contrary, they have chosen to build according to the highest of the three authorized plans, and have exceeded the heights and widths that even this plan required, spending $150,000 more than was necessary to comply with the letter of the law. Instead
17 of a 300-foot opening at low water, one of their channel spans gives 380 feet, and the other 352¼ feet."

IV.

Since the completion of said bridge in February, 1870, it has been in constant use as a railroad bridge, and it is now necessary that the superstructure of said bridge be renewed. The renewal, however, of this superstructure will not in any way obstruct navigation any further than the existing bridge does at present, and has done for forty-six years past.

V.

Since the construction of the bridge of the Louisville Bridge Company, material changes have resulted in connection with the navigation of the falls of the Ohio River, all due to the action of the United States.

Prior to the year 1880 the tolls of the Louisville & Portland Canal at the falls of the Ohio were an onerous burden on river traffic, and the facilities of the canal were such as made navigation through it slow and tedious.

In 1880 the United States acquired said canal, discontinued all charges in the way of tolls, and greatly improved its facilities for navigation, with the result that, continuously since then, navigation over the falls of the Ohio has greatly decreased.

The United States is now engaged in the work of widening the Louisville and Portland Canal, which work, when completed, will probably cause a further increase in navigation through the canal, and further diminish navigation over the falls.

18 VI.

The only participation that the Louisville Bridge Company took in the public hearing referred to in the Bill of Complaint was to

attend the same and protest against any action upon the part of the Secretary of War affecting the bridge here in controversy, on the ground that it could not be required to make any changes in its bridge unless the United States Government paid the expense of such changes, for the legal reasons which the Louisville Bridge Company will urge in this proceeding as affecting the validity of the order of the Secretary of War.

VII.

The bridge in controversy in this action is popularly known as the "Ohio Falls Bridge," and is located at Louisville, Kentucky.

VIII.

While the complainant concedes the truth of the facts in Paragraphs II to VII, inclusive, in this stipulation, it objects and excepts to the introduction of the same in evidence on the grounds that the facts therein stated are irrelevant and immaterial.

IX.

It is expressly agreed, and here stipulated, between complainant and respondent, that the sole question to be determined in this case is the legality of the order of the Secretary of War as applied to the bridge of the respondent.

PERRY B. MILLER, *U. S. Att'y.*
C. H. GIBSON,
WILLIAM W. CRAWFORD,
Attorneys for Respondent.

19 And on another day, to-wit, April 28th, 1916, the following Order of Submission was entered.

THE UNITED STATES
vs.
THE LOUISVILLE BRIDGE COMPANY.

This cause coming on this day for hearing, the plaintiff read on its behalf its petition and the Stipulation of Facts heretofore filed and the Defendant read upon its behalf its Answer and the Stipulation of Facts heretofore filed, and the case having been argued by Perry B. Miller, District Attorney, on behalf of the United States, and by W. W. Crawford on behalf of the defendant, and the Court, not being sufficiently advised, takes further time to consider same.

20 And on another day, to-wit, May 20th, 1916, the following opinion was filed.

THE UNITED STATES
VS.
LOUISVILLE BRIDGE COMPANY.

Opinion.

By an Act approved February 17, 1865, (13 Stats., 431) authority was given the Louisville & Nashville Railroad Company and the Jeffersonville Railroad Company (stockholders in the Louisville Bridge Company) to construct a railroad bridge of a specified character over the Ohio River at the head of the Falls of the Ohio. The authority thus given was made subject to the provisions of the previous Act approved July 14, 1862, 12 Stats., 569.

Under its charter and the authority given by Congress the defendant constructed its bridge. After its completion in 1870 it was inspected by the Board of Engineers of the United States Army. When certifying the result to the Government and to the defendant, among other things, the Board said:

"The board have no changes to recommend in this bridge, which they consider a first-class structure throughout, and very much less an obstruction than it might have been had its builders limited themselves to giving only what they were compelled by law to give. On the contrary, they have chosen to build according to the highest of the three authorized plans, and have exceeded the heights and widths that even this plan required, spending $150,000 more than was necessary to comply with the letter of the law. Instead of a 300-foot opening at low water, one of their channel spans gives 380 feet, and the other 352¼ feet."

During the forty-five years which have followed, the bridge, thus constructed, has been continuously used as a railroad bridge.

By the 18th Section of the Act approved March 3, 1899, (30 Stats., 1153) making appropriations for the construction,
21 repair and preservation of certain public works on rivers and for other purposes, the Secretary of War was authorized, and it was made his duty when he had good reason to believe that any railroad or other bridge then constructed, or which might thereafter be constructed over any of the navigable waterways of the United States, was an unreasonable obstruction to the free navigation of such waters, or was of insufficient height or width of span or otherwise, or where there was difficulty in passing the draw by rafts, steamboats or other water craft, after giving the bridge owner reasonable opportunity to be heard, to give notice to such owner specifying the changes required and the time within which they were reasonably to be completed. Penalties were prescribed for failure to make the changes required, &c.

It is conceded that all the preliminary steps required by the Section were properly taken by the Secretary of war. Afterwards, that officer, in due course, served upon the defendants a notice as follows:

Form No. 6.

WAR DEPARTMENT,
WASHINGTON, D. C., December 12th, 1914.

To Charles H. Gibson, President, Louisville Bridge Company, 906 Realty Building, Louisville, Kentucky:

Take Notice That—

Whereas, The Secretary of War has good reason to believe that the bridge of the Louisville Bridge Company across the Ohio River at Louisville, Kentucky, (commonly known as the "Ohio Falls" bridge) is an unreasonable obstruction to the free navigation of the said Ohio River (which is one of the navigable waterways of the United States) on account of

(1) insufficient horizontal clearance of the channel span crossing the main navigable channel known as "Indiana Chute," and,

(2) insufficient width of opening in the existing span crossing the Louisville and Portland Canal;

And, Whereas, The following alterations, which have been recommended by the Chief of Engineers, are required to render
22 navigation through or under it reasonably free, easy and unobstructed, to-wit:

(1) That the span of said bridge crossing "Indiana Chute" be so changed as to provide a horizontal opening 600 feet wide in the clear.

(2) That the existing swing-span of said bridge across the Louisville and Portland Canal be changed to a lift-span, giving a horizontal clearance of 200 feet, and a vertical clearance, when open, of 78 feet above pool level of 412 feet, U. S. datum.

And, Whereas, three years from the date of service of this notice is a reasonable time in which to alter the said bridge as described above—

Now, Therefore, in obedience to, and by virtue of, section eighteen of an act of the Congress of the United States entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899, the Secretary of War does hereby notify the said Louisville Bridge Company to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before three years from the date of service hereof."

(Sgd.) LINDLEY M. GARRISON,
Secretary of War."

The response of the Bridge Company to this notice was as follows:

"Louisville Bridge Company.
President's Office.

LOUISVILLE, Nov. 26, 1915.

To the Secretary of War, Washington, D. C.:

In re Reconstruction of Superstructure of Louisville Bridge.

Referring to the correspondence and conference heretofore had concerning the above matter, I beg to advise you that I am instructed to say:

1st. The Louisville Bridge Company claims and insists on the right to renew its superstructure on the existing masonry, without making any changes in the length of any of the existing spans, so that, when completed, it will not interfere with navigation any more than it does now.

2nd. The Company intends to at once commence and continue the work of renewing its superstructure as above stated, it being its purpose to first reconstruct the five northern spans of the bridge, including the span over the Indiana channel.

23 If you desire it, detailed plans showing the proposed reconstruction will be furnished you.

Very respectfully,

(Sgd.) CHAS. H. GIBSON,
President."

In this situation the United States filed its bill of complaint against the defendant, in which, having stated in substance that the defendant had failed and refused, and intended to continue to fail and refuse, to comply with the notice given by the Secretary of War, prayed the Court to enjoin the defendant from erecting or causing to be erected, or from taking any steps whatsoever towards the erection or the causing of the erection of a bridge contrary to the requirements set forth in the notice of the Secretary of War aforesaid; or from reconstructing the superstructure of its present bridge upon its present piers in such a manner as to leave a span contrary to the provisions of said order and notice of the Secretary of War, or from taking any steps whatsoever to that end; or from doing any of the matters or things which it threatens to do in its letter of November 26, 1915.

The defendant answered the bill and the parties filed a stipulation agreeing that the material facts were as therein set forth, but we are stating only such of them as may be essential for present purposes. One clause in their agreement was in this language, namely:

"It is expressly agreed and here stipulated between complainant and respondent that the sole question to be determined in this case is the legality of the order of the Secretary of War as applied to the bridge of the respondent."

The case thus presented is of very great importance, alike to the defendant and to the public, and the general question upon which

it is agreed the decision must turn and various illustrative propositions, supposed, more or less, to bear upon it, have been discussed with great earnestness and ability. While in view of the certainty of an appeal, it is not necessary that we should go into much
24 detail, we will, as briefly and clearly as may be, state the grounds upon which we rest our conclusion:

Section 18 of the Act of 1899 has often been under consideration by the Supreme Court. Its constitutionality has been called in question, but the Court distinctly held it to be constitutional in Union Bridge Co. v. United States, 204 U. S., 364, 388; Monongahela Bridge Co. v. United States, 216 U. S., 177, and Hannibal Bridge Co. v. United States, 221 U. S., 194.

While this general proposition must be regarded as settled, nevertheless attempted applications of the provisions of the Section possibly might be subject to constitutional restriction. To illustrate, there is no clause in the act of 1862, or in that of 1865, either authorizing or forbidding renewals of the superstructure. There is no clause in either Act reserving the power to amend its provisions, and there is nothing in Section 18 of the Act of 1899 which gives or contemplates the giving of compensation to the owner of a bridge in case the Secretary of War shall act under its provisions. In view of this condition of applicable legislation the defendant insists that the Secretary's order, though within the letter of the Statute, would, if enforced, be an unconstitutional violation of its rights,

1st, because, in the absence of the reservation of the right to amend the previous Acts, Congress could not make Section 18 of the Act of 1899 applicable to this bridge; and,

2nd, because, to put the Secretary's order into effect would take the defendant's property to the extent of at least $450,000.00 for public use without compensation, in violation of the Fifth Amendment to the Constitution of the United States. The last of these propositions must be regarded as having been definitely foreclosed when the Supreme Court in Hannibal Bridge Co. v. United States, 221 U. S., 194, 205, said:

"It is also firmly settled that such alterations of bridges over the navigable waters of the United States as the Chief of Engineers recommended, and as the Secretary of War required to be made after notice and hearing the parties interested, was not a taking of
25 the property of the owners of such bridges within the meaning of the Constitution. Union Bridge Company v. United States, 204 U. S., 364; Monongahela Bridge Co. v. United States, 216 U. S., 177; Field v. Clark, 143 U. S., 649; Buttfield v. Stranahan, 192 U. S., 470."

But the question, whether Section 18 of the Acts of 1899 can be applied to this case in the absence from the Acts of 1862 and 1865 of any reservation of the right to amend them, and without providing for compensation, is of vital importance and cannot be so easily disposed of. We may examine the general proposition from several standpoints.

The Act of July 14, 1862, (12 Stats., 569) is entitled "An Act to Establish Certain Post Roads." In its first and second sections it

declared two certain bridges authorized by State legislation to be lawful structures. By the third section it was made lawful for other railroad companies, pursuant to their respective charters, to build bridges across the upper Ohio River. The fourth section provided that "any bridge erected under the privilege of this act" may be built in the way prescribed in the section. By the fifth section it is enacted that bridges erected under the provisions of the Act shall be lawful structures and known as post routes. The Act of July 14, 1865, was, as we have seen, supplemental to the Act of 1862, and amended it so "as to authorize" two certain railroad companies, stockholders in the Louisville Bridge Company, to construct the railroad bridge now in question. The defendant is a Kentucky corporation, its charter being an Act of the Legislature of that State approved March 10, 1856, found in Vol. 2 of the Acts of 1855-6, at page 426, and which is therein declared to be a "public law." A proviso in the second section of the Act is in these words:

"Provided, that said bridge shall be constructed so as not to obstruct navigation further than the laws of the United States and the decisions of the Supreme Court of the United States shall hold to be legal." (*Note.)

26 By another Act of the Kentucky Legislature (1 Acts 1861-3, page 153,) it was provided "that the charter of the Louisville Bridge Company, approved 10th of March, 1856, be revived and confirmed to James Guthrie," (**Note) and others, who were invested with all the powers and rights conferred by the charter.

An Act of the Legislature of Kentucky, approved February 14th, 1856, (1 Acts 1855-6, page 15), reserved power in the Legislature "to amend or repeal all subsequent charters or other laws." This was the first appearance of this character of legislation in a general law of the State, but it has been carried forward in all later compilations of our Statutes, and it antedated all the legislation, either State or National, to which we have referred.

It will be observed that the Act of 1862 speaks of bridges erected under the "privileges" of the Act, and the Act of 1865 so amends that of 1862 "as to authorize" certain railroads to build a bridge at the head of the Falls of the Ohio, and it is argued in behalf of the Government that the grant of the privilege and authority thus given to the Kentucky corporation did not make a contract with it. Undoubtedly, what was done by the Acts of 1862 and 1865 was only to give the Bridge Company the privilege and authority to erect a bridge as contemplated by its charter, proviso included. This made

* NOTE.—This proviso is substantially similar to that in the charter of the Union Bridge Company which is found in 204 U. S. at page 367, and in that of the Brownsville Bridge Co., found in 216 U. S., 187.

**Note—Mr. Guthrie was then President of the Louisville and Nashville Railroad Company.

the bridge a lawful structure, that is, a bridge built over a navigable stream under the sanction and authority of a law of the United States. The defendant was thus given a privilege indispensable to its existence, viz., that of permanently using for its own exclusive purposes part of the public domain extending from one bank of a navigable river to the other. In this way the defendant
27 was enabled to erect and maintain a great and costly bridge, and has enjoyed the profitable privilege for many years. But do these facts bring into view anything which fills any definition of the word "contract?" It may not be possible to answer this question in the affirmative, in the absence from the Acts of 1862 and 1865 of language which justifies the conclusion that Congress at the time had in contemplation either the making of a contract itself or giving authority to the United States to make a contract in the premises which could not be altered or changed without the consent of the Bridge Company.

That clause of the Constitution which inhibits State (though not Federal) legislation impairing the obligation of contracts has been the subject of consideration in innumerable cases, and the wisdom and justice of it have been vindicated beyond the possibility of further doubt.

Beginning probably with the Dartmouth College case, the Supreme Court has made many decisions annulling State laws, which, in one way or another, had infringed this constitutional provision. Among those decisions were such as had applied it to State charters of corporations. Such charters were held to be contracts which could not, without the consent of the corporation, be changed unless power to do so had been reserved. Resulting from this situation it became almost universally customary in State legislation to reserve such power either in the Charter itself or in the general laws, as was done in Kentucky by the Act of February 14, 1856, supra. The custom thus fixed from necessity State legislation begun in 1869 out of abundant caution to manifest itself in congressional enactments respecting authority to build bridges over navigable waters, and in many of the cases against bridge companies, such reservations simplified the questions to be decided.

We cannot suppose, however, that this custom has been
28 exalted into constitutional sanctity, nor that it has in any wise diminished or affected that power of Congress which finds its warrant in the provision that "The Congress shall have power * * * to regulate commerce with foreign nations and among the several States"—words which, decided cases will possibly show, have developed greater and more varied potentialities than any similar number of words ever uttered by man.

While, in many instances, Congress, had it seen fit to do so, might have ameliorated, and softened some apparently harsh results by provisions requiring compensation therefor, it has not done so in Section 18 of the Act of 1899. Many instances of the ruthless results of legislation under the commerce clause of the Constitution have appeared where the courts, and especially the Supreme Court, have found no power to avoid them. The case of Louisville & Nash-

ville R. R. Co. v. Mottley, 219 U. S., 467, is one of the most striking of these. There, Mottley and his wife, in 1871, having been severely injured while traveling on one of the trains of the Railroad Company, made a contract with the Railroad Company whereby the parties settled the claims for compensation for the injuries inflicted by agreeing that the Railroad Company should give the injured persons passes over its entire line of railroad during their natural lives respectively. This contract continued in force for nearly forty years, when the Railroad Company sought to annul it under the provisions of the Interstate Commerce Act of 1887 as amended in 1906 and the Court held that that must be the result because the contract must be considered to have been entered into in contemplation of the possibility that Congress might, at some future time, if the public interest demanded it, exert its power to annul it under the commerce clause of the Constitution. Many instances were cited where similar principles were applied, and the Court particularly emphasized what it had held in Addyston Pipe & Steel Co. v. United States, 175 U. S., 211, and quoted from page 228, where,
29 among other things, it had said:

"The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself.

"In Gibbons v. Ogden (supra), the power was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution.

"Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce, (and when we speak of interstate we also include in our meaning foreign commerce). We do not assent to the correctness of the proposition, that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned.

"The power to regulate interstate commerce is, as stated by Chief-Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body."

The general principle applied in the Mottley case has, as the opinion shows, controlled several other cases where it was held that the power of Congress to regulate commerce was unlimited, unless some provision in the Constitution itself could be found which interposed a barrier. These general principles have a strong bearing upon the case before us.

Whether or not there is a contract express or implied between the United States and the defendant, arising out of the Acts of 1862 and 1865, and the erection, on the faith thereof, of the defendant's

bridge, can the Government alter or withdraw the privilege or authority given by those acts and enforce against the defendant the provisions of Section 18 of the Act of 1899, without giving defendant compensation to be measured by the increased cost? Certainly nothing can be found in the language of either of the Acts
30 which indicates that Congress intended, either to bind itself or to bind the United States not to modify or withdraw the privilege, or authority given the defendants, or to require the United States to make compensation in case the Secretary of War acted under Section 18.

Nevertheless, Judge Jackson, of the District Court of West Virginia, in United States v. Parkersburg, etc. R. R. Co., 134 Fed., 969,972, (the Parkersburg Bridge case), held that relief similar to that here sought by the United States could not be granted without giving the defendant compensation. In support of this view he cited McGahey v. Virginia, 135 U. S., 693, though that case was one of many cases where the sole question involved was, whether State legislation could impair the obligation of a contract. The judgment of Judge Jackson was affirmed by the Circuit Court of Appeals (4th Circuit), 143 Fed., 224. The syllabi to that report correctly show the points decided to be as follows:

"1. The right of a railroad company which constructed a bridge over a navigable stream, in conformity to the requirements of an act of Congress authorizing the same to maintain such bridge as a lawful structure, includes the right to pair or to renew the superstructure when necessary to its safe use, and, where it is at all times, both during and after the alteration, kept and maintained in conformity to the act, the courts have no power to enjoin the work or to abate the structure as a nuisance, on the ground that it is an unlawful obstruction to navigation.

"2. A railroad bridge over a navigable stream, built under authority of an act of Congress which contained no reservation as to repeal, modification, or alteration, can only be required to be removed or replaced by a new bridge constructed, in accordance with Act March 3, 1899, c. 425, 30 Stats., 1121, by an act of Congress authorizing the same and providing for just compensation."

The learned Court, in its opinion, alluded to the case of Bridge Co. v. United States, 105 U. S., 470, but said it was not applicable. Besides several cases decided by the lower federal courts, it cited the case of United States v. Cincinnati, &c., Co., 134 Fed., 353, decided by the Circuit Court of Appeals of the Sixth Circuit,
31 and which arose under an Act approved April 2, 1888, (25 Stats., 74) the only important question being, whether the replacement of a wooden bridge by an iron one was the erection of a new bridge, and this was decided in the negative. The Court (143 Fed.) also cited two cases decided by the Supreme Court, the earliest of which was Monongahela Navigation Co. v. United States, 148 U. S., 312. That as a proceeding under an Act of Congress for the condemnation by the United States for public use of property known as the "Upper Lock and Dam" owned by the Navigation Company, and, of course, compensation was allowed. The other

case cited by the Court was United States v. Lynah, 188 U. S., 445, in which Lynah had sued the United States to recover the value of certain land taken and appropriated by the Government for the construction of dams in the Savannah River. The Court held that there was an implied contract to pay the value of the land taken, and affirmed the judgment in favor of the plaintiff therefor.

Whether or not the cases cited support the rulings in the Parkersburg Bridge case, we do not feel free to follow those rulings because of what has been said in many later cases, although in United States v. Baltimore and Ohio R. R. Co., 229 U. S., 244, 254, the Supreme Court said:

"How far, if at all, the grant of the right to build the bridge under the terms specified in the Act of 1862, with no reservation of the right to alter or amend, will operate to limit the power of Congress to directly legislate on the subject of the removal or alteration of the bridge, is a question we are not here concerned with, and, therefore, express no opinion upon it."

and although practically the same reservation was made in Bridge Co. v. United States, 105 U. S., 476.

While the question did not concern the Court in those cases, in other cases decided since that of the Parkersburg Bridge, it has given, what we must suppose are such strong, indications of its views as sufficiently to point the course we must take. That is to say, it has laid down general rules upon general principles that must be accepted by this Court as controlling in this in-
32 stance.

In the Hannibal Bridge case already cited, 221 U. S., 205, the Court distinctly ruled that requiring alterations in a bridge was not a taking of private property for public use. To the same effect had been its decisions in Union Bridge Co. v. United States, 204 U. S., 388. It likewise so held in Monongahela Bridge v. United States, 216 U. S., 177, 193.

In the latter case at pages 193, 194, the Court said:

"Although the Brownsville Bridge was originally constructed under the authority of the Commonwealth of Pennsylvania, and may not, at the date of its erection, have been an illegal structure or an unreasonable obstruction to navigation in the condition, at that time, of commerce and navigation on the Monongahela River, the bridge must be taken as having been constructed with knowledge, on the part of all, of the paramount power of Congress to regulate commerce among the States, and subject to the condition or possibility that Congress might, at some time after its construction, and for the protection or benefit of the public, exert its constitutional power to protect free navigation as it then was against unreasonable obstructions; that the mere silence of Congress and its failure to directly interfere and prevent the original construction of the bridge, under the authority of Pennsylvania, imposed no constitutional obligation on the United States to make compensation for subsequent changes or alterations, which the public good, in its judgment, required to be made."

In that case we find no reservation by the State of the right to amend the Bridge Company's charter. The charter of the Bridge Company, however, contained a proviso similar to that in defendant's charter. 216 U. S., 187.

In the case of the Union Bridge Co. v. United States, 204 U. S., at page 400, and in Hannibal Bridge Co., 221 U. S., at page 207, the Court used language in substance the same as that we have extracted from 216 U. S., 193, 194. The lesson we take from this is, that the general principle thus stated will ultimately be applied indiscriminately to cases where there was such reservation, and to those where there was none, and that the question reserved in United States v. Baltimore & Ohio R. R. Co., 229 U. S., 254, and in Bridge
33 Co. v. United States, 105 U. S., 476, will be so determined as definitely to support the paramount authority of Congress over the navigable waters of the United States regardless of the apparent injustice and hardship which the courts may be compelled to inflict in the absence of an exercise by Congress of its exclusive power to provide for compensation to owners of bridges situated as is the defendant in this case. Hard as this result may be, it cannot be harder than that of nullifying contracts of great importance between individuals, as was done in the Mottley case and many others.

Clauses reserving power in Congress to amend a law granting authority to construct bridges over navigable waters seem first to have been noticed by the Supreme Court in Bridge Co. v. United States 105 U. S., 470, 476. Speaking of it as a "new provision," Chief Justice Waite said that its first appearance in congressional legislation on the subject of bridges is in the Act of February 19, 1869, (15 Stats., 272), passed at the same session of Congress as the Act under consideration. Of course, such provisions make the task of the courts easier, but it does not necessarily follow that we must hold that one Congress can prevent a succeeding Congress from exercising its power to regulate commerce by any failure to make the reservation in acts like those of 1862, 1865, or 1899. This strikes us as being especially essential to the unfettered exercise by each succeeding Congress of the right to regulate commerce and to adjust legislation for that purpose to new exigencies and conditions as they arise. If this power does not exist almost without limitation, we have read in vain rulings like those in Louisville & Nashville R. R. Co. v. Mottley, 219 U. S., where, at page 408, it is said—

"There are certain propositions at the base of this inquiry which we need not discuss at large, because they have become thoroughly established in our constitutional jurisprudence. One is, that the power granted to Congress to regulate commerce among the States and with foreign nations is complete in itself, and it is un-
34 restricted except by the limitations upon its authority to be found in the Constitution. Gibbons v. Ogden, 9 Wheat., 1; Brown v. Maryland, 12 Wheat., 419; Addyston Pipe and Steel Co. v. United States, 175 U. S., 211, 229; Scranton v. Wheeler, 179 U. S., 141, 162, 163; C., B. & Q. R. R. Co. v. Drainage Com'rs, 200 U. S., 561; Union Bridge Co. v. United States, 204 U. S., 364, 400; Atlantic Coast Line, &c v. Riverside Mills, 219 U. S., 186, 202."

In the last of the cases quoted, on page 202, the Court said:

"Undoubtedly the United States is a government of limited and delegated powers, but in respect of those powers which have been expressly delegated, the power to regulate commerce between the States being one of them, the power is absolute except as limited by other provisions of the Constitution itself."

We find no provision in the Constitution which can in any wise limit the operation of the commerce clause in this connection, unless it be that one in the fifth amendment which requires compensation to be made when private property is taken for public use. If such property be directly taken by the Government in order to accomplish some purpose of its own in the regulation of commerce, such, for example, as the building of a dam or harbor, the fifth amendment would require compensation to be made to the owner.

We take it, however, that compensation in every case must depend upon the concurrence of two essential facts.

1st, there must be an actual taking of property by the Government; and,

2nd, such taking must be for public use. Each of these factors is essential, though we may assume that the Government would not take property for other than public uses. The Supreme Court, as we have seen, has frequently held that requiring a bridge company to change its superstructure over a navigable river so that it will not unreasonably obstruct navigation, is not a "taking" of property by the United States at all. The Government in such cases takes no property and gets none. What it does, in this instance, and what it has done in others, is to require the Bridge Company to
35 comply with the promise it made when it accepted its charter, namely, to so construct its bridge as not to obstruct navigation further than the laws of the United States made it legal. The obligation of this promise is, we think, continuous, and Section 18 of the Act of 1899 is as operative upon defendant's bridge as it is upon any other within its purview.

Besides, the defendant's bridge, like others, must be considered as having been built in contemplation of the possibility of the exercise by Congress of its constitutional right and duty to require alterations, when necessary, for the regulation of commerce. But if the Bridge Company, either upon an implied contract to compensate it or upon any equitable ground, has any claim against the United States growing out of the acts of the Secretary of War, it can sue in the Court of Claims under Section 145 of the Judicial Code, and always it can appeal to Congress. In order that we may not obstruct in any way these avenues to relief, we express no opinion as to whether or not any obligation upon the United States can be implied from the facts developed in this case. We think, indeed, that whether there was a contract or not, Section 18 must be enforced, leaving the question of compensation to be settled elsewhere—this Court being powerless, tho if the Court had been convinced that any sort of contract had been made which required compensation by the United States in case its powers were exercised under that section, it possibly was within the Court's discretion to refuse an injunction until the

equity a. ..g out of that situation had been done by the Government—thus leaving each party to its remedies at law.

It may further illustrate our views to add the suggestion, that if proposed legislation, fairly considered, is a regulation of interstate or foreign commerce, the constitutional power of Congress to pass it cannot be affected by anything a previous Congress may have done short of express contract or pledge of public faith, though such previous action may greatly affect the question of the wisdom or the justice of the proposed measure in the estimation of those who are to vote upon it.

At the argument many cases were cited by one side or the other bearing upon illustrative contentions,—but we think none of them should modify the conclusions we have reached. They do
36 not, therefore, seem to require further notice, though they have not been overlooked.

After very careful consideration of the laws of the United States, the charter of the defendant, and the decisions of the Supreme Court in connection with the stipulated facts, we have been forced to conclude,

1st. That although there was no reservation of the right to amend the Acts of 1862 and 1865, it was, under the Constitution, within the power of Congress to enact Section 18 of the Act of 1899, and other similar legislation affecting bridges over navigable -aters;

2nd. That carrying into effect the order of the Secretary of War will not constitute the taking of any of the property of the defendant by the Government for public use.

3rd. That as Congress has made no provision for compensation to the bridge owner in such cases, this Court has no power over the subject.

4th. That the charter of the defendant required it to construct its bridge so as not to obstruct navigation further than the laws of the United States and the decisions of the Supreme Court should hold to be legal, which, we think, means that the construction shall always meet those requirements; and,

5th. That whether or not there is a contract between plaintiff and defendant, the order of the Secretary of War is enforceable, leaving Congress or the Court of Claims to determine the question of compensation, they alone, in their respective spheres, having power over it.

We, therefore, hold that the order of the Secretary of War is a legal order, as applied to defendants bridge, and that the injunction prayed for should be granted. What should be the precise form of the order can be carefully considered, but it should provide
37 that granting the injunction is without prejudice to the defendant's right to seek or sue for any compensation to which it may be entitled.

May 20, 1916.

WALTER EVANS, *Judge.*

38 And on another day, to-wit, June 10th., 1916, the following Decree was entered of Record.

UNITED STATES, Complainant,
vs.
LOUISVILLE BRIDGE COMPANY, Respondent.

Decree.

The parties this day came by their counsel of record, and

This cause having been heard at this term and having been argued by counsel, and the Court being sufficiently advised, delivered its opinion in writing, which is filed and made part of the record.

Pursuant to said opinion it is now ordered, adjudged and decreed by the Court as follows, to-wit:

1st. That the order of the Secretary of War dated December 12th, 1914, and set forth in the Bill of Complaint, is a lawful order as applied to the bridge of the respondent, and, consequently, its requirements must be obeyed by the respondent.

2nd. The defendant having in writing notified the complainant of its purpose to renew its structure without conforming to said order of the Secretary of War, it is further ordered, adjudged and decreed that the Louisville Bridge Company, its officers, agents, servants, workmen and employes of every character, be, and they are by this decree, jointly and severally, permanently enjoined and restrained from erecting or causing to be erected, or from taking any steps whatsoever towards the erection or the causing of the erection of a bridge across the Ohio River at Louisville, Kentucky, contrary to the requirements set forth in the said order of the Secretary of War
39 of date December 12th, 1914, requiring,

(1) That the span of said bridge crossing "Indiana Chute" be so changed as to provide a horizontal opening 600 feet wide in the clear;

(2) That the existing swing-span of said bridge across the Louisville & Portland Canal be changed to a lift-span, giving a horizontal clearance of 200 feet and a vertical clearance, when open, of 78 feet above the pool level of 412 feet U. S. Datum.

Or from reconstructing the superstructure of its present bridge upon its present piers in such a manner as to leave a span contrary to the provisions of said order and notice of the Secretary of War, or from taking any steps whatever to that end.

It is further adjudged by the Court that the complainant recover of the respondent its costs herein, for which execution may issue.

The granting of this injunction is without prejudice to the respondent's right to seek or sue for any compensation to which it may be entitled, if any.

40 And on another day, to-wit, June 19th., 1916, the following order was entered of record.

UNITED STATES OF AMERICA
vs.
LOUISVILLE BRIDGE COMPANY.

This day came the Louisville Bridge Company, defendant herein, by Gibson & Crawford, its counsel, and presented to the Court its Petition for Appeal and Assignment of Errors, and upon consideration whereof, it is now ordered that said Petition and Assignment of Errors be filed, and an appeal be, and is, hereby allowed, to have reviewed in the Supreme Court of the United States the decree and proceedings heretofore entered herein, upon giving bond according to law in the sum of Two hundred and fifty dollars, which shall not operate as a supersedeas.

And thereupon the said Louisville Bridge Company presented for acceptance and approval such bond in the sum of Two hundred and fifty ($250.00) dollars, with the United States Guaranty Company as surety, which bond is now ordered filed, and is accepted and approved by the Court.

WALTER EVANS, *Judge.*

41 And on another day, to-wit, June 19th., 1916, the following assignment of Errors, *were* filed.

THE UNITED STATES, Complainant,
vs.
LOUISVILLE BRIDGE COMPANY, Defendant.

Assignment of Errors.

And now, on the 19th day of June, 1916, came the defendant, Louisville Bridge Company, by Charles H. Gibson and William W. Crawford, its Solicitors, and says that the Decree in said cause is erroneous and against the just rights of said Louisville Bridge Company for the following reasons:

1st. Because the Decree entered herein adjudged that the Act passed by the Congress of the United States March 3, 1899, applied to the bridge of the Louisville Bridge Company;

2nd. Because the Decree entered herein adjudged that the Act passed by the Congress of the United States March 3, 1899, could be applied to the bridge of the Louisville Bridge Company, and was not in contravention of the Constitution of the United States when so applied;

3rd. Because the Decree entered herein failed to adjudge that the Louisville Bridge Company, when it built its bridge known as the "Ohio Falls Bridge" under the Act of the Congress of the United States approved July 14, 1862, as amended by the Act approved February 17, 1865, acquired a property right in the maintenance of the bridge which could only be destroyed by the Government of the United States upon the payment to the Louisville Bridge Company of just compensation as provided in the Fifth Amendment to the Constitution of the United States.

42

4th. Because the Decree entered herein failed to adjudge that when the Louisville Bridge Company built its bridge in accordance with the Act of the Congress of the United States, approved July 14, 1862, as amended by the Act approved February 17, 1865, in neither of which Acts was the right of amendment or appeal retained by the Congress of the United States, the Louisville Bridge Company entered into a contract with the United States which was protected from the taking or destruction under a subsequent Act of Congress by the Fifth Amendment to the Constitution of the United States.

5th. Because the Decree entered herein adjudged that the power in Congress to regulate commerce with foreign nations and among the several States and with Indian tribes, gave the Secretary of War the right, under the Eighteenth Section of the Act of March 3, 1899, concerning obstructions to navigation by bridges, to require alterations to the bridge of the Louisville Bridge Company built under the Act of the Congress of the United States approved July 14, 1862, as amended by the Act approved February 17, 1865, which would cost over Four hundred thousand dollars ($400,000.00) without any provision having been made by Congress to pay for such alterations.

6th. Because the Decree entered herein adjudged that the United States can abrogate the contract entered into between it and the Louisville Bridge Company by the Act of July 14, 1862, as amended by the Act of February 17, 1865, upon the faith of which contract the Louisville Bridge Company expended large sums of money, when neither of said Acts of Congress constituting the contract retained in the United States the right to alter or amend same after said expenditures were made.

43 7th. Because the Decree entered herein held that the Act of March 3, 1899, with reference to obstructions to navigation by bridges authorized the Secretary of War to make any order with reference to the bridge of the Louisville Bridge Company.

8th. Because the Decree entered herein enjoined the defendant from proceeding with the reconstruction of parts of the superstructure of its bridge, when the same was a lawful structure, and no provision had been made by Congress to pay for the destruction of the property of the Louisville Bridge Company, which compliance, with the order of the Secretary of War with reference to said bridge, would cause.

9th. Because the Decree entered herein failed to adjudge that under the Fifth Amendment to the Constitution of the United States the bridge of the Louisville Bridge Company was not lawful property which would not be taken or destroyed by Congress under its power to regulate commerce unless just compensation was made for the property so taken or destroyed.

10th. Because the Decree entered herein failed to dismiss the Bill of Complaint of the United States.

11th. Because the Decree entered herein granted an injunction to the United States.

C. H. GIBSON,
WILLIAM W. CRAWFORD,
Attorneys for Defendant.

44 And on another day, to-wit, June 19th, 1916, the following bond was filed, approved and allowed.

THE UNITED STATES, Complainant,
vs.
LOUISVILLE BRIDGE COMPANY, Defendant.

Bond.

Know all men by these presents: That we, the Louisville Bridge Company, as principal, and the United States Guaranty Company, as surety, are held and firmly bound unto the United States in the full sum of Two hundred and fifty and no/100 dollars, to be paid to the United States, for which payment, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 19th day of June, A. D. 1916.

Whereas, lately at a District Court on the 10th day of June, 1916, in a suit pending in said court between the United States, complainant, and Louisville Bridge Company, defendant, a decree was rendered against said Louisville Bridge Company, and said Louisville Bridge Company having obtained an appeal and filed a copy thereof in the Clerk's office of said court to reverse the decree in the aforesaid suit, and a citation directed to the United States, citing and admonishing it to be at the session of the Supreme Court of the United States to be holden at the City of Washington on the 12th day of July next,

Now, the conditions of said obligation are such, that if the said Louisville Bridge Company shall prosecute its appeal to ef-
45 fect and answer all damages and costs if it fail to make its plea good, then the above obligation shall be void; otherwise, to remain in full force and virtue.

LOUISVILLE BRIDGE COMPANY,
By CHAS. H. GIBSON AND
WILLIAM W. CRAWFORD,
Attorneys.

UNITED STATES GUARANTY COMPANY,
By PEYTON N. CLARKE, *Agent.*

Approved this 19th day of June, 1916.

WALTER EVANS,
Judge District Court of the United States
for the Western District of Kentucky.

46 And on another day, to-wit, June 19th, 1916, the following Præcipe was filed.

THE UNITED STATES, Complainant,
vs.
LOUISVILLE BRIDGE COMPANY, Defendant.

Præcipe.

By agreement of the Louisville Bridge Company, by counsel, and the United States, by counsel, the Clerk will copy for the purpose of composing the record upon this appeal:

The Bill of Complaint filed by the United States;

Answer of the Louisville Bridge Company;

Stipulation filed by the United States and the Louisville Bridge Company;

Order submitting case;

Opinion of the District Court and the Judgment and Decree entered thereon;

Petition for Appeal, with Order allowing same;

Assignment of Errors;

Citation;

Bond executed by the Louisville Bridge Company.

C. H. GIBSON,
WILLIAM W. CRAWFORD,
Attorneys for Louisville Bridge Co.
PERRY B. MILLER,
United States District Attorney for Western District of Kentucky.

47 *Clerk's Certificate.*

I, A. G. Ronald, Clerk of the District Court of the United States, for the Western District of Kentucky, at Louisville, do hereby certify that the foregoing 46 pages contain a true and correct transcript of the record and proceedings in the case of the United States vs. The Louisville Bridge Company, No. 31, copies in accordance with the Præcipe of the Appellant to be found on page 46 of this record, as the same appears in the files and records in my said office.

Witness my hand and seal of said Court this 23 day of June, A. D., 1916.

[Seal District Court of the United States, Wes. Dist. Ky.]

A. G. RONALD, *Clerk*,
By GEORGE W. RONALD, *D. C.*

[10-cent U. S. Internal Revenue Stamp, canceled.]

48 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington

on the 17 day of July, 1916, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Western District of Kentucky, wherein the Louisville Bridge Company is appellant and the United States is respondent, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States on the 19th day of June, A. D. 1916.

WALTER EVANS,
District Judge.

June 19th, 1916.

Above citation and service thereof accepted for the United States.

[Seal District Court of the United States, Wes. Dist. Ky.]

PERRY B. MILLER,
U. S. District Attorney for Western District of Kentucky.

Endorsed on cover: File No. 25,370. W. Kentucky D. C. U. S. Term No. 540. Louisville Bridge Company, appellant, vs. The United States. Filed June 28th, 1916. File No. 25,370.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

LOUISVILLE BRIDGE COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 540.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

MOTION BY THE UNITED STATES TO ADVANCE.

Now comes the Solicitor General and moves the court to advance this cause for hearing to a day convenient to the court, under the provisions of section 5 of Rule 26.

The case involves the same question as was involved, but not decided, in *United States* v. *Baltimore & Ohio Railroad Company*, 229 U. S. 244, namely, the right of the appellant to reconstruct its bridge in a manner different from that prescribed by the Secretary of War, acting under the

63432—16

provisions of section 18 of the River and Harbor Act of March 3, 1899, 30 Stat. 1121, 1153, 1154. The appellant's bridge is one of the important bridges across the Ohio River at Louisville, Ky., and owing to changes of conditions it has become essential to the public interest that said bridge be reconstructed as soon as possible, and the appellant is desirous, in good faith, of so reconstructing its bridge immediately, but denies the power of the Secretary of War to prescribe the method in which such reconstruction shall be made and claims the right to reconstruct the bridge according to its own plans. The public interest requires that the controversy should be determined as soon as possible, so that an important highway of commerce may be placed in proper condition.

Opposing counsel concur.

JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1916.

○